Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

AMIEL CUETO
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the First Amendment was violated when the accused, Amiel Cueto, was punished with a prison-sentence and fine in excess of the statutory maximum, because the trial judge stated at sentencing that the accused had "abused the First Amendment" and had treated it (the First Amendment) with license", in that the accused had published newspaper articles or editorials offensive to the judge, and if the First Amendment was violated, whether the violation is indicative of a bias or appearance of bias requiring the judge's disqualification under 28 U.S.C. §455(a).

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OPINIONS BELOW

The Memorandum and Order of the Honorable Stephen N. Limbaugh, dated January 25, 2000; the Order of the U.S. Seventh Circuit Court of Appeals denying the Petition for Writ of Mandamus, dated April 25, 2000. See App. A-1 and App. A-21, respectively.

JURISDICTION OF THIS COURT

The judgment of the Seventh Circuit Court of Appeals was entered on April 25, 2000. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. §371 provides:

> Conspiracy to commit offense or defraud United States
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. §1503 provides:

> Influencing or injuring officer or juror generally
>
> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United

States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

28 U.S.C. §144 provides:

Bias or prejudice of judge

Whenever a party of any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a

certificate of counsel of record stating that it is made in good faith.

28 U.S.C. §455(a) provides:

> Disqualification of justice, judge, or magistrate
>
> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. §2255 prevides:

> Federal custody; remedies on motion attacking sentence
>
> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

U.S. Const., Amendment I provides:

> Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The accused, Amiel Cueto, was found guilty on June 11, 1997, after a jury trial, of one count of Conspiracy to Defraud the United States in violation of 18 U.S.C. §371. The alleged fraud did not involve any pecuniary or property injury. The jury also found the accused guilty of three counts of Obstruction of Justice in violation of the omnibus clause of 18 U.S.C. §1503. The accused was found not guilty of one count of Conspiracy to Defraud the United States and two counts of Obstruction of Justice.

On September 19, 1997, the Honorable Stephen N. Limbaugh presided over the sentencing of the accused, Amiel Cueto. Before passing sentence, Judge Limbaugh called Cueto to approach the podium in front of the bench. The judge then delivered a prepared explanation for the sentence he was about to impose. The following is the complete text of the judge's comment:

> "Mr. Cueto, if you and counsel will come forward please.
>
> "I really feel that one of the jewels of our system is the First Amendment.
>
> "And the First Amendment gives all of us unprecedented rights that other people in the world do not have.
>
> "It does not authorize license. And in my judgment, Mr. Cueto, you have abused the First Amendment, you have treated it with license, and you have abused the judicial system.
>
> "And for that you should be punished."

(See App. A-24 which is page 65 of the sentencing transcript.)

In an order on January 25, 2000, Judge Limbaugh explained what he meant by Cueto's having "abused the First Amendment", and having "treated it with license". See App. A-24.

> "The newspaper articles referred to are in connection with a newspaper owned and published by defendant Cueto called the East Side Review. In the East Side Review Cueto personally authored several articles in which he complained of prosecutorial misconduct in association with the racketeering case and maligned the integrity and reputations of several Assistant United States Attorneys involved in the investigation and prosecution of the racketeering case."

The newspaper articles and editorials published in *East Side Review* which the judge alleged had "maligned the integrity and reputations of several Assistant United States Attorneys", are attached in the appendix as App. A-26-31.

On September 19, 1997, after telling Cueto that he "should be punished" for the offensive articles and editorials published in the *East Side Review*, Judge Limbaugh proceeded to impose the following sentence: Count 1, Conspiracy to Defraud the United States in violation of 18 U.S.C. §371, maximum sentence under the statute, 60 months and a $5,000 fine. On each of Counts 2, 6 and 7, Obstruction of Justice in violation of the omnibus cause of 18 U.S.C. §1503, 87 months, an $80,000 fine, two years supervised release, and a $500/

month assessment of the costs of imprisonment. All sentences were ordered to run concurrently.

On October 1, 1997, the defendant surrendered to the federal penitentiary at Springfield, Missouri. He has been incarcerated ever since.

The gravamen of Count 1 (Conspiracy to Defraud the United States, which did not allege any pecuniary or property injury), was in paragraph 43 of the Indictment.

> "43. *It was further a part of the conspiracy* that in January 1995 *Cueto caused to be published* through the Century Printing Company, *a newspaper tabloid known as the East Side Review* which he then caused to be mailed to approximately 48,000 households in the metro east St. Louis area. CUETO would and did threaten by intimidation in the East Side Review that he would prosecute (Illinois Liquor Control Agent) Robinson if CUETO won the election for State's Attorney." (Italics added.)

Paragraph 62, sub-paragraph n of the indictment alleged:

> "In or between January 1995 and January 1996, CUETO'S company, the 1967 Corporation, would and did pay $215,000 to Century Printing for publication of the East Side Review."

Cueto was indicted in July 1996. All the newspaper articles and editorials which constituted the crime in Count 1 had been published more than a year prior to Cueto's indictment. All of the newspaper articles and editorials which offended Judge Limbaugh (see App. A-26-31), and which were the basis of the sentence the judge imposed, had also been pub-

lished in Cueto's newspaper, *East Side Review*, more than a year before Cueto was indicted. See also App. A-32 which is a copy of the editorial "Local Justice Department Nazis Who Also May Be Prosecuted By State Authorities" as it appeared in the *East Side Review* in January, 1995 (a year and a half prior to Cueto's indictment). App. A-33 is Exhibit 28-2A which is a copy of this same editorial introduced at trial over Cueto's objection as the crime in Count 1. However, please note that in the exhibit shown to the jury, the name of Miriam Miquelon was redacted from the editorial. Ms. Miquelon was the lead prosecutor who obtained Cueto's indictment and who conducted the case for the government against Cueto at trial.

Amiel Cueto is the first person since the Sedition Act expired by its own terms in 1801, to be convicted of the crime of having "caused to be published ... a newspaper". See paragraph 43 of the Indictment at App. A-102. For Count 1 (which was alleged to be a conspiracy to defraud the United States), Cueto was sentenced to the maximum 60 months and $5,000 fine allowed under 18 U.S.C. §371.

See App. A-76 which is Point 5 of Cueto's Memorandum in Support of Motion For Relief Under 28 U.S.C. §2255. In that Point 5, the defendant meticulously shows how each of the alleged acts of Obstruction of Justice as charged in Counts 2, 6 and 7, took place before September 13, 1994. The statute - 18 U.S.C. §1503 - before that date, provided for a maximum sentence of 60 months and $5,000 fine. Nevertheless, Judge Limbaugh sentenced Cueto to 87 months and an $80,000 fine on each of Counts 2, 6 and 7. See App. A-91, which is the Judgement and Commitment Order.

Attached is App. A-97, which is the Government's response to Point 5. The Government does not dispute that each of the alleged acts of obstruction of justice by Cueto was committed before September 13, 1994. (The Government claims the sentences were not excessive because they *could* have been ordered to run consecutively. But see App. A-92. The sentences were imposed concurrently.)

Amiel Cueto is the first person in American history to be convicted of obstruction of justice for filing a "false" Petition for Writ of Certiorari in the Supreme Court (Count 2), or for "engaging in acts to persuade" a prosecutor to indict an FBI informer (Count 6), or for having "prepared" (but never filed) a motion to disqualify a judge under 28 U.S.C. §455 (Count 7). See excerpt from the Indictment at bar, attached hereto as App. A-100.

The defendant's conviction was affirmed. See *U.S. v. Cueto*, 151 F.3d 620 (7th Cir. 1998). The defendant's Petition for Writ of Certiorari on direct appeal was denied. *U.S. v. Cueto*, ____U.S. ____, 119 S.Ct. 1249 (March 22, 1999).

On November 1, 1999, Cueto filed a Motion for Relief Under 28 U.S.C. §2255. (See App. A-34.) On the same day, Cueto field a Motion to Disqualify Judge Limbaugh under 28 U.S.C. §144 and §455(a). On January 25, 2000, Judge Limbaugh refused to allow the Motion to Disqualify to be assigned to another judge, and he denied the Motion to Disqualify. (See App. A-1) On April 25, 2000 in a one-page form-order, the Seventh Circuit denied Cueto's Petition for Writ of Mandamus. (See App. A-21.)

Your Petitioner prays for a Writ of Certiorari to decide the important First Amendment issues and substantial matters of federal law involving judicial disqualification under 28 U.S.C. §455 raised herein.

REASONS FOR GRANTING THE WRIT

THE TRIAL JUDGE VIOLATED THE FIRST AMENDMENT BY IMPOSING A SENTENCE ON THE DEFENDANT IN EXCESS OF THE STATUTORY MAXIMUM; THAT SENTENCE BEING BASED ON THE JUDGE'S OPINION OF THE DEFENDANT'S NEWSPAPER EDITORIALS AND ARTICLES; AND THIS FIRST AMENDMENT VIOLATION WAS INDICATIVE OF A BIAS OR APPEARANCE OF BIAS, REQUIRING THE JUDGE'S DISQUALIFICATION UNDER 28 U.S.C. §455(a).

Although the trial judge's comments at defendant's sentencing were cited earlier in this Petition, the full text of Judge Limbaugh's statement bears repeating:

> "Mr. Cueto, if you and counsel will come forward please.
>
> "I really feel that one of the jewels of our system is the First Amendment.
>
> "And the First Amendment gives all of us unprecedented rights that other people in the world do not have.
>
> "It does not authorize license. And in my judgment, Mr. Cueto, you have abused the First Amendment, you have treated it with license, and you have abused the judicial system.

"And for that you should be punished."

The judge then proceeded to impose the maximum sentence allowed by the statute under Count 1, that being Conspiracy to Defraud the United States by Cueto's having "caused to be published . . . a newspaper". See paragraph 43 of the Indictment, App. A-102. The judge then imposed a sentence of 87 months imprisonment and $80,000 fine on each of Counts 2, 6 and 7 (each charged as Obstruction of Justice); all sentences to run concurrently.

There has never been any dispute about the fact that it is a First Amendment violation if a person is"punished" for having exercised his or her rights under the First Amendment. See *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533 (1989). "(T)he government may not prohibit the expression of an idea simply because society finds the idea itself disagreeable or offensive." See also *Dawson v. Delaware*, 503 U.S. 159, 112 S.Ct. 1093 (1992): "Whatever label is given to the evidence (that the defendant Dawson had been a member of the Aryan Brotherhood) presented, however, we conclude that Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing more than Dawson's abstract beliefs." 112 S.Ct. at 1098. Also from *Dawson*: "We conclude that ... the Aryan Brotherhood evidence (was) totally without relevance to Dawson's sentencing proceeding". 112 S.Ct. at 1097..

These cases (and others) were cited in the original Motion to Disqualify Judge Limbaugh, and the government did not respond to or even address them. Judge Limbaugh, in his order of January 25, 2000 (App. A-1), denied first the motion under 28 U.S.C. §144 to assign

the Motion to Disqualify to another judge. Then Judge Limbaugh himself denied the Motion to Disqualify himself. In doing so, Judge Limbaugh purported to explain his sentencing comments at pages 7 and 8 of the January 25, 2000 order:

> "Thus, an objective, disinterested observer would conclude that even if this *Court were bothered by Cueto's claim of First Amendment protection*, he had nevertheless been indicted and successfully prosecuted for abusing the judicial system '(a)nd for that you should be punished'. The Court's comments do not demonstrate any *actual* prejudice or bias." (Italics added.) App. A-9.

Tellingly, Judge Limbah does not address the "appearance" of bias. More tellingly, the Court implicitly admits to being personally "bothered" by Cueto's First Amendment claim. And of course, a main point of the underlying §2255 motion (as well as the Motion to Disqualify Judge Limbaugh) is that one of the reasons Cueto had been "successfully prosecuted" was because of Judge Limbaugh's bias. But what is quite startling in Judge Limbaugh's holding, is his claim that the "that" in the sentence "(a)nd for that you should be punished", referred only to Cueto's allegedly having "abused the judicial system". Judge Limbaugh's claim cannot stand objective analysis.

The full text of Judge Limbaugh's comment to Cueto consists of six sentences. In the second sentence, Judge Limbaugh referred to the First Amendment as a "jewel" (which it indeed is). In the third sentence, Judge

Limbaugh, for the second time, referred to the First Amendment; this time as the source of "unprecedented rights" (which it is). In the fourth sentence, Judge Limbaugh referred to the First Amendment a third time, saying that "(i)t does not authorize license". In the fifth sentence, Judge Limbaugh referred to the First Amendment twice, rebuking Cueto for having "abused the First Amendment" and for having "treated it with license". Finally, after having delivered a carefully prepared speech which directly referred to the First Amendment five times, Judge Limbaugh added a single throwaway clause, "and you have abused the judicial system". The sixth and last sentence from Judge Limbaugh was: "And for that you should be punished".

Judge Limbaugh would have us believe that the "that" in the last sentence referred only to Cueto's alleged abuse of the judicial system, and did not have *any* reference to the First Amendment. With all respect to Judge Limbaugh, that argument is simply wrong. Judge Limbaugh uses the words "First Amendment" three times and the pronoun "it", referring to the First Amendment, twice; all in a planned explanation for the reason that Cueto "should be punished". Judge Limbaugh's attempt to absolve himself of having violated the First Amendment in ordering Cueto "punished" for having "abused the First Amendment", is indicative of yet *an additional* bias or appearance of bias by Judge Limbaugh. His order of January 25, 2000, denying the Motion to Disqualify, is itself indicative of a bias or appearance of bias, and is itself grounds for this Court to grant the relief requested.

Judge Limbaugh's tortured dissection of his sentencing commentary, is not the only part of his January 25, 2000 order which shows his bias or appearance of bias. At page 7 of the order Judge Limbaugh admits that his own personal bias or "opinion" was the basis of his comments at sentencing: "As the transcript shows, this Court did express its opinion that defendant had abused his First Amendment rights". And earlier in the order, in a footnote on page 4, Judge Limbaugh even explains how the judge arrived at his "opinion" that "defendant had abused his First Amendment rights": (App. A-5.)

> "The newspaper articles referred to are in connection with a newspaper owned and published by defendant Cueto called the East Side Review. In the East Side Review, Cueto personally authored several articles in which he complained of prosecutorial misconduct in association with the racketeering case and maligned the integrity and reputations of several Assistant United States Attorneys involved in the investigation and prosecution of the racketeering case." (App. A-5.)

Attached as App. A-26 are the "articles" (which include fact and opinion and parody) which Judge Limbaugh asserts "maligned the integrity and reputations of several Assistant United States Attorneys". The word "malign" is defined as "to utter injuriously misleading or deliberately and injuriously false reports about". (See Webster's Third New International Dictionary of the English Language Unabridged. Published by Encyclopedia Britannica, Inc. copyright 1986.) The judge's claim that Cueto published anything false about "the integrity" of any federal prosecutor is simply not true. There was no evidence that any fact or opinion or parody expressed by Cueto through his newspaper pub-

lication was false. To the contrary, defendant Cueto tried to introduce these articles into evidence (along with the proof of their veracity) to counter the charges in paragraph 43 and 62(n) of the indictment.[1]

What is crystal clear from the judge's "opinion" that Cueto had "maligned the integrity" of federal prosecutors, is Judge Limbaugh's own bias, or certainly an appearance of bias. Judge Limbaugh was offended by Cueto's articles and editorials and parodies. As a result he redacted the name of Miriam Miquelon - the prosecutor who conducted the investigation and prosecution of defendant Cueto - more than 40 times from documents shown to the jury. For example, the government introduced into evidence Cueto's editorial: "Local Justice Department Nazis Who Also May be Prosecuted By State Authorities". See App. A-32 for a copy of the editorial as it appeared in Cueto's newspaper, *East Side Review*. Now please see App. A-33 (Government Exhibit 28-2A) for the version which was introduced and argued to the jury. As the Court can see, the name of Miriam Miquelon was deleted, and of course the defense was not allowed to tell the jury that the lead prosecutor at trial was the person who the editorial referred to as having "threatened State's Attorney Robert Haida last summer" (that is, the summer of 1994, two years before Cueto was indicted); or that Ms. Miquelon had "threat-

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[1] Judge Limbaugh blames Cueto for compelling the judge to read the "unedited *East Side Review* articles" thereby causing the judge to "gain" the "alleged bias"(see App. A-7). But the judge had refused to dismiss the allegations in paragraph 43 and 62(n) that Cueto had committed a crime by publishing his newspaper. Cueto had then been required to seek to prove that he was justified in publishing the *East Side Review*. But Judge Limbaugh denied him the right to do so.

ened to frame Haida"; or that Cueto's editorial opinion was that Ms. Miquelon was one of the "two particular Nazis (who) have Justice Department badges".

Whether Cueto's articles and editorials constituted a crime or not is not the direct issue before this Court, rather the issue is whether Judge Limbaugh violated the First Amendment and whether that violation is indicative of a bias or appearance of bias. Nevertheless the nature of the crime in Count 1, and the punishment the Court inflicted on Cueto under Counts 2, 6 and 7, are certainly probative on Judge Limbaugh's First Amendment violation, and therefore on his bias or appearance of bias.

The gravamen of the crime charged in Count 1 is found in paragraph 43; and is referred to in paragraph 62(n) of the Indictment.

> "43. *It was further a part of the conspiracy* that in January 1995 *Cueto caused to be published* through the Century Printing Company, *a newspaper tabloid known as the East Side Review* which he then caused to be mailed to approximately 48,000 households in the metro east St. Louis area. CUETO would and did threaten by intimidation in the East Side Review that he would prosecute (Illinois Liquor Control Agent) Robinson if CUETO won the election for State's Attorney." (Italics added.) (App. A-102.)

> "62(n) In or between January 1995 and January 1996, CUETO'S company, the 1967 Corporation, would and did pay $215,000 to Century Printing for publication of the East Side Review." (App. A-104.)

The Sedition Act, 1 Stat 596 (1798), expired by its own terms on March 4, 1801, the last day of President John Adams' term. President Jefferson then pardoned all those convicted under the statute. This Court has since taught that the First Amendment forbids prosecution for "criminal" libel; see *Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631 (1963); *Donbrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116 (1975). However in the case at bar, the defendant Cueto was indicted in 1996 with a charge that was *worded exactly the same* as the indictments which the government had brought under the Sedition Act in 1800. In the case at bar, innovative federal prosecutors simply *charged the very same crime* of sedition, only they brought it under 18 U.S.C. §371 (Conspiracy to Defraud the United States). Consider the case of *U.S. v. Callender*, C.C.Va 1800, F.Cas. No. 14,709.

James Thomson Callender was a Scot who had arrived in America as a fugitive from a sedition indictment in England. In 1800, Callender published a book, *The Prospect Before Us*. He was indicted and prosecuted for violation of the Sedition Act because his book had blasted President Adams as a "hoary-headed incendiary who has deserted and reversed all his principles". The government's indictment against Callender in 1800 charged:

> "The accused is a person of wicked, depraved, and turbulent mind and is disposed toward evil. He has written and *caused to be published* these words with the bad intent of bringing (President John Adams) into contempt, and to excite the hatred of the people against him and their government." (Italics added.) [See Francis Wharton, ed., "Trial of James

> Thompson (sic) Callender for a Seditious Libel in the Circuit Court of the United Sates for the Virginia District. Richmond, 1800. In "*State Trials of the United States during the Administration of Washington and Adams*", pp. 688-721. Washington, D.C. 1849; reprinted 1970.]

Please note the predicate language of the offense with which Callender was charged. "He has written and *caused to be published*". (Italics added.) Now compare the indictment against the accused at bar charging Conspiracy to Defraud the United States:

> "43. It was further a part of the conspiracy that in January 1995 CUETO *caused to be published* through Century Printing Company, a newspaper tabloid known as the East Side Review". (Italics added.) (App. A-102.)

The indictment of Callender in 1800 for violation of the Sedition Act cannot be distinguished from the indictment of Cueto in 1996 for Conspiracy to Defraud the United States.[2]

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[2] Callender's case was similar to Cueto's in other important respects. Callender was not allowed to call witnesses in his defense; neither was Cueto, all Cueto's essential witnesses were barred. (See App. A-113.) Callender was not allowed by Justice Samuel Chase to testify in his own defense; Cueto was allowed to take the stand (and he did), but Judge Limbaugh barred him from testifying to any facts which would have proved his innocence. (See App. A-110.) Justice Chase all but directed the jury to find Callender guilty; Judge Limbaugh instructed the jury that if Cueto had had a corrupt motive to "hinder the due administration of justice", by performing "(a)ny act ... whether lawful or unlawful", through "(a)ny means, though lawful in themselves", Cueto was then guilty of obstruction of justice. (See App. A-129.) Judge Limbaugh also eliminated the requirement of specific intent as an

(Footnote 2 continued on next page)

Callender was sentenced to nine months in prison and fined $200 by Justice Samuel Chase, Cueto was sentenced to five years in prison and fined $5,000 on Count 1, the maximum sentence allowed under 18 U.S.C. §371, Conspiracy to Defraud the United States. (Prior to the indictment at bar, the accused Cueto had never been charged with a crime.) Callender was pardoned by President Jefferson and his fine was remitted. Cueto has been in prison since October 1, 1997. (Justice Chase was later impeached by the House of Representatives, in part for his conduct at Callender's trial, but was acquitted by the Senate in 1805.)

James Callender's crime was a seditious libel against President Adams. In the case at bar, the public officials who were aggrieved by the editorial opinions Cueto wrote and published in the *East Side Review*, were the very prosecutors who had Cueto indicted and who personally conducted the prosecution for the government at Cueto's trial.

Since the Sedition Act expired, this Court has held over and over again that the First Amendment does not permit the government to "punish" a person because of what that person may have "caused to be published" in a newspaper. Although *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964) was a libel case brought in tort, not a criminal case, the teachings of this

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(Footnote 2 continued)

element of theoffense in Cueto's case. The jury was instructed with a general-intent, civil-proximate-cause, negligence-tort type standard: "(T)he government only has to establish that the defendant *should have reasonably seen* that the *natural and probable* consequences of his acts was (sic) the obstruction of justice." (Italics added.) (See App. A-129.)

Court on the rights of newspaper publishers are applicable to the issue at bar.

> "The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is and always will be folly; but we have staked upon it our all.'" 376 U.S. at 270, 84 S.Ct. at 720.
>
> "(There is) a profound material commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270, 84 S.Ct. at 721.

The *Sullivan* opinion quotes Justice Brandeis, 84 S.Ct. at 720-21; John Stuart Mill, 84 S.Ct. at 721; and James Madison, 84 S.Ct. at 723; all to explain our historical commitment to a free press.

Returning now to Judge Limbaugh's comments to, and sentencing of Cueto on September 19, 1997; Judge Limbaugh imposed the maximum sentence allowed under 18 U.S.C. §371 because Cueto had "caused to be published... a newspaper", which newspaper had offended the judge because it had "maligned" federal prosecutors; and by publishing the newspaper Cueto had "abused the First Amendment", and had "treated it with license", which was the reason Cueto "should be punished". Your Petitioner respectfully submits that the maximum punishment inflicted on Cueto under Count 1 is in and of itself a First Amendment violation. This violation in and of itself constitutes a bias or an

appearance of bias. But Judge Limbaugh's "punish(ment)" under Counts 2, 6 and 7 (each charged as Obstruction of Justice under 18 U.S.C. §1503) also shows a startling bias or appearance of bias. Under each Count, Judge Limbaugh "punished" Cueto with a sentence of 27 months of imprisonment and $75,000 in fines, greater than the maximum penalty allowed under the statute. There is no doubt that this extra-statutory punishment was imposed because the judge had been offended by Cueto's newspaper articles and editorials and parodies, which the judge claimed had falsely injured (see definition of "maligned" *supra*) the integrity and reputations of federal prosecutors. There was however, no evidence at trial that any *East Side Review* publication contained anything that was false. In any event, this Court has taught that there is no such thing as a false opinion. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974) and *Restatement (Second) of Torts* §566, comm. c (1977). Nor can a cartoon (see App. A-27) which parodies the U.S. Attorney as "Flounder", or the First Assistant U.S. Attorney as "Herr Grupenfuhrer", or other assistant U.S. Attorneys as "Hitler Youth", be the basis even for tort damages. See *Hustler v. Falwell*, 485 U.S. 46, 108 S.Ct. 876 (1988). Before the case at bar, it would have been unthinkable to suggest that such a cartoon would subject the publisher to a long prison sentence and a large fine. But the record proves beyond question that that's what happened here.

It is undisputed that each and every act which was alleged to constitute each of the crimes under Counts 2, 6 and 7, had been committed before September 13, 1994. (See App. A-76-82 and App. A-97-99.) There is no doubt that the maximum sentence Congress had provided for

under 18 U.S.C. §1503 before September 13, 1994, was 60 months in prison and a $5,000 fine.

In Count 2, for example, Cueto was charged with violating 18 U.S.C. §1503 by filing a false brief in this Court on May 17, 1994.[3] See paragraph 64 of the Indictment; App. A-105. This brief was alleged to be false because it was supposed to have "attacked the integrity of the judges on the Court of Appeals", see paragraph 32 at page 14 of the Indictment, App. A-101. The other "false pleadings" in Count 2 were alleged to have been filed in the Seventh Circuit and the District Court, but these "false pleadings" were filed before the Supreme Court brief in May 1994. Therefore, there is no question that the crime charged in Count 2 was committed several months before September 13, 1994; nor is there any question that the maximum sentence allowed under 18 U.S.C. §1503 prior that date was 60 months and a $5,000 fine.

Yet see App. A-91, which is the Judgment and Commitment order entered by Judge Limbaugh. Cueto was sentenced on Count 2 to 87 months of imprisonment and a fine of $80,000; thus there is no doubt that the "punish(ment)" Judge Limbaugh inflicted on the accused under Count 2 was 27 months longer and $75,000 in fines higher than the statute permitted. Based on Judge Limbaugh's comment at sentencing that Cueto "should be punished" because he had "abused the First Amendment", and had "treated it with license", there can be no doubt that this extra-statutory prison term and fine were imposed in violation of the First Amend-

[3] The brief that was introduced into evidence by the government was redacted to a few lines. See App. A-132 which is the exhibit the jury saw. Judge Limbaugh denied Cueto's request to admit the entire brief.

ment to punish the accused for having exercised his right to publish his editorial opinions in his newspaper.[4]

The accused has spent considerable time on the first half of the issue at bar, the First Amendment violation by Judge Limbaugh. Now your Petitioner will address the point that this violation requires Judge Limbaugh's disqualification under 28 U.S.C. §455(a).

An objective standard applies to a motion under §455(a), which is described as whether a reasonable and objective person, fully apprised of the facts, would harbor doubts about the judge's impartiality. *Liljeberg v. Health Services Acquisition*, 486 U.S. 847, 860-61 (1988). "The goal of section 455(a) is to avoid even the appearance of partiality." *Id.* at 860. Put simply, avoiding even the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself. Should the grounds give pause as to whether disqualification is necessary, the relief should be granted.

The Seventh Circuit, in a one-sentence order, denied the Petition for Writ of Mandamus to disqualify Judge Limbaugh (see App. A-21); however that court has recognized the difficulty that judges have in implement-

[4] See App. A-76-82 and App. A-97-99. Just as with Count 2, there is no question that each act which constituted the crime under Counts 6 and 7, was also committed before 18 U.S.C. §1503 was amended on September 13, 1994. The government never denied that fact, and neither did Judge Limbaugh. Therefore there is no question that Judge Limbaugh's sentence on each of Counts 6 and 7 was 27 months longer and $75,000 in fines greater than the statute allowed; and finally there can be no question - based on the judge's comments at sentencing and on his January 25, 2000 order - that the extra prison time and fine were imposed because Judge Limbaugh was offended by Cueto's newspaper, *East Side Review*.

ing this objective standard, because judges are reluctant to cast perceived aspersions on colleagues or to question their own motives. *In Re Mason*, 916 F.2d 384 (7thCir. 1990). But the temptation to draw all inferences against disqualification must be avoided if the objective standard required by law is to be faithfully implemented: "Yet drawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard under §455(a) into a demand for proof of actual impropriety." *Id.* at 386.

In *U.S. v. Liteky*, 510 U.S. 540, 114 S.Ct. 1147 (1994), this Court was asked to determine whether the "extrajudicial" source doctrine survived the amended version of §455(a). The Court left little standing of the "extrajudicial" doctrine. Yet Judge Limbaugh, in his January 25, 2000 order, citing Seventh Circuit cases delivered prior to *Liteky*, claims that his reading of *East Side Review* articles which had "bothered" him (App. A-26) were extrajudicial, and therefore cannot be a basis for disqualification. (The judge doesn't address *Liteky* as it pertains to the extrajudicial doctrine, which is startling, given that *Liteky* is the most recent case from this Court on the issue at bar, and was cited by Cueto in his Motion to Disqualify Judge Limbaugh.) As your petitioner has explained, Judge Limbaugh denied all motions to dismiss before trial (indeed Judge Limbaugh denied each and every single one of Cueto's more than 60 pre-trial motions), and so the accused was forced to try to defend himself at trial against the allegations in paragraphs 43 and 62(n) that his publication of the *East Side Review* was a crime. In his defense, Cueto submitted articles and editorials and parodies to the trial court. Judge Limbaugh refused to allow the jury to see any references

to any parts of the *East Side Review*, except those which the government introduced. (And even then, the defense was sternly warned not to tell the jury - or even to imply - that the prosecutor, Ms. Miquelon's name had been redacted.)

Nevertheless there is no distinction between a "personal" bias, which requires disqualification, and an official bias, which according to Judge Limbaugh, does not.

> "Bias and prejudice seem to us not divided into the 'personal' kind, which is offensive, and the official kind, which is perfectly all right. . . . interpreting the term 'personal' to create a complete dichotomy between court-acquired and extrinsically acquired bias produces results so intolerable as to be absurd. Imagine, for example, a lengthy trial in which the presiding judge for the first time learns of an obscure religious sect, and acquires a passionate hatred for all its adherents. This would be 'official' rather than 'personal' bias, and would provide no basis for the judge's recusing himself." *Liteky*, 510 U.S. at 549-50.

Moreover, *Liteky* noted that comments made at an earlier judicial proceeding involving the Judge whose disqualification is sought were "extrajudicial": "First, *Grinnell* (the only opinion of ours to recite the [extrajudicial] doctrine) clearly meant by 'extrajudicial source' a source outside the judicial proceeding at hand - which would include as extrajudicial sources earlier judicial proceedings conducted by the same judge." *Id.* 510 U.S. at 545, 114 S.Ct. at 1152 citing *United States v. Grinnell Corp.*, 384 U.S. 563, 865 S.Ct. 1698 (1966). Indeed, *Liteky* noted with approval the Court's earlier ruling in *Berger v. United States*, 255 U.S.22, 41 S.Ct. 230 (1921)

requiring recusal on the basis of judicial remarks made in a prior proceeding. *Liteky*, 510 U.S. at 545, 114 St. Ct. at 1152.

The petitioner's §2255 action is a separate and distinct civil proceeding from the earlier, underlying criminal case, which means that Judge Limbaugh's remarks at the sentencing hearing in the criminal case, were extrajudicial to the civil case at bar, according to the express language of *Liteky*.[5]

Judge Limbaugh's January 25, 2000 order, which denied the motion to disqualify him, relied on *U.S. v. Balistrieri*, 779 F.2d 1191 (7th Cir.1985). But *Liteky* was decided by this Court in 1994, and overrules *Balistrieri*. That Judge Limbaugh would rely on *Balistrieri* and refuse to address *Liteky*, is indicative of a bias or appearance of bias, in and of itself.

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[5] Judge Limbaugh's fundamental error in the January 25, 2000 order (App. A-1), was that he would not recognize the fact that a §2255 action is separate and independent from the underlying criminal case. Nowhere in his January 25, 2000 order does he admit the long settled principle that the §2255 petition is a separate, distinct, independent, civil action. *Heflin v. United States*, 358 U.S. 415, 79 S.Ct. 2194 (1959). Judge Limbaugh in fact treated the §2255 as a continuation of the criminal case, and on that basis, he denied the Motion to assign the Motion to Disqualify Judge Limbaugh to another judge. Judge Limbaugh found that the §144 Motion was untimely. (App. A-1) However, the Motion to Disqualify Judge Limbaugh under 28 U.S.C. §144 and §455(a) had been filed on November 1, 1999, the same day that the Motion for Relief Under 28 U.S.C. §2255 was also filed. The Motion to Disqualify could not have been filed even one day earlier, because there was no pending proceeding in which to file it. Judge Limbaugh's refusal to recognize that the proceeding at bar is separate and independent from the criminal case is the ostensible reason he would not allow the Motion to Disqualify Judge Limbaugh to be heard by a judge other than Judge Limbaugh himself.

The majority and concurring *Liteky* opinions differ as to the importance placed upon the "extrajudicial" source of the allegations of bias. The majority opinion believes the "extrajudicial" source of alleged bias is a "factor" in any analysis, though it is not dispositive, and the concurrence would not distinguish between the source of alleged bias, extrajudicial or otherwise. It is clear, however, that under the approach of either the majority or concurring opinions, whether the allegations of bias may be characterized as "extrajudicial" is *not* outcome determinative.

More importantly, this difference in degree among the members of this Court as to the "extrajudicial doctrine" is irrelevant to the issue at bar because the allegations requiring disqualification raised herein are "extrajudicial". The "extrajudicial" doctrine is simply an acknowledgment that a trial court's rulings or ordinary attempts at courtroom administration, even be they impatient or short tempered, can only rarely, if ever, be grounds for recusal.

Such a concern is not raised here because no trial ruling or attempt at courtroom administration by Judge Limbaugh is raised by Cueto as a ground for disqualification. The "extrajudicial" doctrine simply does not apply to *prior* judicial proceedings involving the Judge whose disqualification is being sought. As Justice Scalia put it: "First, *Grinnell* (the only opinion of ours to recite the [extrajudicial] doctrine) clearly meant by 'extrajudicial source' a source outside the judicial proceeding at hand - which would include as extrajudicial sources earlier judicial proceedings conducted by the same judge." *Id.* 510 U.S. at 545, 114 S.Ct. at 1152, citing *United States v. Grinnell Corp.*, 384 U.S. 563, 865, S.Ct. 1698, 15 L.Ed.2d 778 (1966).

Therefore, even if this Court were to believe that there is any life to the "extrajudicial" doctrine in light of *Liteky*, which is doubtful, this doctrine did not provide a basis for denying Cueto's motion to disqualify Judge Limbaugh. Given that this §2255 motion is distinct from the earlier *criminal* proceeding over which Judge Limbaugh presided, the judge's violation of the First Amendment in sentencing Cueto on September 19, 1997 was "extrajudicial" to the *civil* case at bar.

Moreover, even if one were to assume that Judge Limbaugh's violation were not "extrajudicial", Judge Limbaugh's disqualification is still required. Consider the following from Justice Scalia:

> "(J)udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. An example of the latter (and perhaps of the former as well) is the statement alleged to have been made by the District Judge in *Berger v. United States*, a world War I espionage case against German-American defendants: 'One must have a very judicial mind, indeed, not [to be] prejudiced against German Americans" because their "hearts are reeking with disloyalty.'" *Liteky*, 510 U.S. at 556, 114 S.Ct. at 1147. Emphasis in Original.

Under the standard above, Judge Limbaugh's comments at sentencing require disqualification for two reasons, even if it is assumed that they are "intrajudicial." First, they obviously "reveal an opinion that derives

from an extrajudicial source." It is beyond question that the Judge's sentencing comments derive from his opinion of the *East Side Review*; in fact Judge Limbaugh admitted as much in his January 25, 2000 order. But Judge Limbaugh himself would not allow into evidence the *East Side Review* articles and editorials and parodies which offended the Judge. Therefore, the Judge's comments were not a reaction to admitted evidence.

Second, the sentencing comments "reveal such a high degree" of "antagonism as to make fair judgment impossible." The notion that Cueto should be "punished" for "abusing the First Amendment", or "treat(ing) it with license", is much like the anti-German sentiments condemned by Justice Scalia in *Liteky*, an expression of deep seated hostility that precludes fair judgment. In either event, either because the comments are "extrajudicial" or because they fall under the exception to the doctrine, disqualification is required.

In Judge Limbaugh's January 25, 2000 order, he says at page 13: "This Court has searched not only the court files and transcripts, but also its conscience to determine if some bias against defendant Cueto was so consuming that it prejudicially affected the Court's rulings. The answer is no." (App. A-16.)

Your petitioner does not question Judge Limbaugh's *subjective* belief that he was unbiased. But the analysis under 28 U.S.C. §455(a) is an *objective* inquiry: "Any justice, judge or magistrate of the Untied States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This objective standard looks, not to a judge's subjective state of mind, but, rather, would a reasonable, disinterested third

person knowing the facts, believe an appearance of partiality exists.

Both the *Liteky* majority and concurring opinions agree on this. Consider Justice Scalia's majority opinion in which he stated that allegations seeking disqualification were "*all* to be evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal was required whenever 'impartiality might reasonably be questioned'."[6] 510 U.S. at 548, 114 S.Ct. 15 1154. Emphasis in the original. The concurring opinion by Justice Kennedy, and joined by three other members of the Court, showed no division on this point:

> "The standard that ought to be adopted for all allegations of an apparent fixed predisposition, extrajudicial or otherwise, follows from the statute itself: Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified. Indeed, in such circumstances, I should think that any judge who understands the judicial office and oath would be the first to insist that another judge hear the case." 510 U.S. at 564, 114 S.Ct. at 1162 (Kennedy, J., concurring.)

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[6] Justice Scalia also put to rest the notion that under 28 U.S.C. §144, a judge must exhibit a "personal" bias in order for a motion to be well taken. He defines "personal" as merely being a "perjorative" term "without meaning the adjective to do anything except emphasize the idiosyncratic nature of bias and prejudice". 510 U.S. at 549-50, 114 S.Ct. 15 1154, 549-50.

Judge Limbaugh believed that he was not biased; but with all respect to the judge, a reasonable, disinterested third party would disagree. Judge Limbaugh violated the First Amendment in punishing defendant Cueto because the judge had been offended by the defendant's newspaper, *East Side Review*, and that violation is indicative of bias or appearance of bias. Judge Limbaugh should be disqualified under 28 U.S.C. §455(a)

CONCLUSION

Your Petitioner prays that a writ of certiorari be granted to decide the important First Amendment issues and matters of substantial federal law involving judicial disqualification under 28 U.S.C. §455 raised herein.

Respectfully submitted,

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